

THIS OPINION IS NOT A
PRECEDENT OF THE TTAB

Mailed: September 8, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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In re My Happi Gift LLC

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Application Serial No. 97118213

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Di Li of Di Li Law P.C. for My Happi Gift LLC.

Brian Pino, Trademark Examining Attorney, Law Office 114,
Nicole Nguyen, Managing Attorney.

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Before Bergsman, Lynch, and Coggins,
Administrative Trademark Judges.

Opinion by Bergsman, Administrative Trademark Judge:

My Happi Gift LLC (“Applicant”) seeks registration on the Principal Register of the mark YANI L’ADORE, for “Business card holders in the nature of wallets; Card wallets; Clutch bags; Crossbody bags; Tote bags; Wallets,” in International Class 18.¹

In its application, Applicant translated “L’adore” as follows:

The English translation of “L’adore” in the mark is “love.”

¹ Application Serial No. 97118213 was filed November 10, 2021, under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based upon Applicant’s intent to use the mark in commerce.

Applicant also stated that “[t]he name shown in the mark does not identify a particular living individual.”

The Examining Attorney refused to register Applicant’s mark under Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), on the ground that it so resembles the registered mark YANNI (in standard characters) for “tote bags,” in International Class 18, as to be likely to cause confusion.² Registrant, in his registration, identified YANNI as “John Yanni Christopher, whose consent(s) to register is made of record.”

When we cite to the record, we refer to the USPTO Trademark Status and Document Retrieval (TSDR) system in the downloadable .pdf format by page number (e.g., August 29, 2022 Office Action (TSDR 24)). When we cite to the briefs, we refer to TTABVUE, the Board’s docketing system, by docket number and page number (e.g., 4 TTABVUE 3).

Section 2(d) of the Trademark Act, 15 U.S.C. § 1052(d), prohibits the registration of a mark that:

[c]onsists of or comprises a mark which so resembles a mark registered in the Patent and Trademark Office, or a mark or trade name previously used in the United States by another and not abandoned, as to be likely, when used on or in connection with the goods of the applicant, to cause confusion, or to cause mistake, or to deceive.

We base our determination under Section 2(d) on an analysis of all the probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion. *In re E. I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567

² Registration No. 5683063 registered February 26, 2019, under Section 2(f) of the Trademark Act, 15 U.S.C. § 1052(f).

(CCPA 1973) (setting forth factors to be considered, referred to as “*DuPont* factors”); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003). “Whether a likelihood of confusion exists between an applicant’s mark and a previously registered mark is determined on a case-by-case basis, aided by application of the thirteen *DuPont* factors.” *Omaha Steaks Int’l, Inc. v. Greater Omaha Packing Co.*, 908 F.3d 1315, 128 USPQ2d 1686, 1689 (Fed. Cir. 2018). “In discharging this duty, the thirteen *DuPont* factors ‘must be considered’ ‘when [they] are of record.’” *In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162 (Fed. Cir. 2019) (quoting *In re Dixie Rests. Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533 (Fed. Cir. 1997) and *DuPont*, 177 USPQ at 567).

Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See In re Charger Ventures LLC*, 64 F.4th 1375, 2023 USPQ2d 451, at *4 (Fed. Cir. 2023) (“In any given case, different *DuPont* factors may play a dominant role and some factors may not be relevant to the analysis.”); *Citigroup Inc. v. Cap. City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011). “Not all *DuPont* factors are relevant in each case, and the weight afforded to each factor depends on the circumstances. Any single factor may control a particular case.” *Stratus Networks, Inc. v. UBTA-UBET Commc’ns Inc.*, 955 F.3d 994, 2020 USPQ2d 10341, at *3 (Fed. Cir. 2020) (citing *Dixie Rests.*, 41 USPQ2d at 1533).

“Each case must be decided on its own facts and the differences are often subtle ones.” *Indus. Nucleonics Corp. v. Hinde*, 475 F.2d 1197, 177 USPQ 386, 387 (CCPA 1973). “Two key factors in every Section 2(d) case are the first two factors regarding

the similarity or dissimilarity of the marks and the goods or services, because the ‘fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.’” *In re Embiid*, 2021 USPQ2d 577, at *10 (TTAB 2021) (quoting *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976)). See also *In re i.am.symbolic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (“The likelihood of confusion analysis considers all *DuPont* factors for which there is record evidence but ‘may focus ... on dispositive factors, such as similarity of the marks and relatedness of the goods.’”) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *In re Chatam Int’l Inc.*, 380 F.3d 1340, 71 USPQ2d 1944, 1945-46 (Fed. Cir. 2004).

I. The similarity or dissimilarity and nature of the goods

Applicant is seeking to register its mark for “business card holders in the nature of wallets; card wallets; clutch bags; crossbody bags; tote bags; wallets.” The mark in the cited registration is registered for “tote bags.” The goods are in part identical.

Under this *DuPont* factor, the Examining Attorney need not prove, and we need not find, similarity as to each product listed in the description of goods. It is sufficient for a refusal based on likelihood of confusion that we find any item encompassed by the identification of goods in a particular class in the application and registration related. *Tuxedo Monopoly, Inc. v. Gen. Mills Fun Grp.*, 648 F.2d 1335, 209 USPQ 986, 988 (CCPA 1981); *In re St. Julian Wine Co.*, 2020 USPQ2d 10595, at *3-4 (TTAB

2020); *In re i.am.symbolic, llc*, 116 USPQ2d 1406, 1409 (TTAB 2015), *aff'd*, 866 F.3d 1315, 123 USPQ2d 1744 (Fed. Cir. 2017).

Applicant, in its brief, does not contest that the goods are in part identical or otherwise related.

II. Established, likely-to-continue channels of trade and classes of consumers

Because the goods in the application and the cited registration are in part identical, we presume that the channels of trade and classes of purchasers are the same. *See In re Viterra Inc.*, 671 F.3d 1358, 101 USPQ2d 1905, 1908 (Fed. Cir. 2012) (identical goods are presumed to travel in same channels of trade to same class of purchasers) (cited in *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1801 (Fed. Cir. 2018) (“With respect to similarity of the established trade channels through which the goods reach customers, the TTAB properly followed our case law and ‘presume[d] that the identical goods move in the same channels of trade and are available to the same classes of customers for such goods”)); *In re Yawata Iron & Steel Co.*, 403 F.2d 752, 159 USPQ 721, 723 (CCPA 1968) (where there are legally identical goods, the channels of trade and classes of purchasers are considered to be the same); *United Global Media Grp., Inc. v. Tseng*, 112 USPQ2d 1039, 1049 (TTAB 2014).

Applicant, in its brief, does not contest that the goods are offered in the same channels of trade to the same classes of consumers.

III. The strength of Registrant’s YANNI trademark

The strength of Registrant’s mark affects the scope of protection to which it is

entitled. At a minimum, Registrant’s mark YANNI has been registered on the Principal Register with a claim of acquired distinctiveness and, therefore, it is entitled to the benefits accorded registered marks under Section 7(b) of the Trademark Act, 15 U.S.C. § 1057(b) (registration is prima facie evidence of the validity of the registration and registrant’s exclusive right to use the mark in commerce).³ *See, e.g., Bell’s Brewery, Inc. v. Innovation Brewing*, 125 USPQ2d 1340, 1347 (TTAB 2017) (Board gave cited mark “the normal scope of protection to which inherently distinctive marks are entitled.”).

Although neither Applicant nor the Examining Attorney discussed the strength of the cited mark, Applicant did concede that “[t]he cited mark ‘YANNI’ refers to a Famous Individual.”⁴ Applicant submitted the Wikipedia.org entry for “Yanni,” “a Greek-American composer, keyboardist, pianist, and music producer.”⁵ According to the Wikipedia.org entry,⁶

³ Because neither the Examining Attorney, nor Applicant, submitted the relevant prosecution history from Registrant’s application, we do not know why Registrant registered YANNI under Section 2(f) of the Trademark Act.

⁴ September 12, 2022 Response to an Office Action (TSDR 8).

⁵ *Id.* at TSDR 14.

⁶ Internet documents may be used to demonstrate what the documents show on their face, not to demonstrate the truth of what has been printed. *See, e.g., Empresa Cubana Del Tabaco v. Gen. Cigar Co.*, 2022 USPQ2d 1242, at *7 (TTAB 2022) (where “the parties seek to rely on the contents of the webpages for the truth of any assertion made therein, the statements in the websites are hearsay unless supported by testimony or other evidence”), *civil action filed*, No. 1:23-cv-00227 (E.D. Va. Feb. 20, 2023); *Chutter, Inc. v. Great Mgmt. Grp., LLC*, 2021 USPQ2d 1001, at *33 n.69 (TTAB 2021) (YouTube video stating number of “results” and “views” admissible only to show what has been printed, not the truth of what has been printed), *appeal docketed*, No. 22-1212 (Fed. Cir. 2021); *Spiritline Cruises LLC v. Tour Mgmt. Servs., Inc.*, 2020 USPQ2d 48324, at *2 (TTAB 2020) (Internet printouts and other materials properly introduced under a notice of reliance without supporting testimony considered only for what they show on their face rather than for the truth of the matters asserted). *Compare Embiid*, 2021 USPQ2d 577, at *5 n.19 (Board is “more permissive regarding the use of

Yanni received international recognition by producing concerts at historic monuments and by producing videos that were broadcast on public television. His breakthrough concert, *Live at the Acropolis*, yielded the second best-selling music video of all time. ...

At least sixteen of Yanni's albums have peaked at No. 1 in *Billboard's* "Top New Age Album" category and two albums (*Dare to Dream* and *In My Time*) received Grammy Award nominations.⁷

Without financial backing, Yanni risked \$2 million of his personal fortune in the *Acropolis* production in a strategy to boost his artistic profile and open new markets for his music. The resulting video was broadcast on PBS and became one of its most popular programs ever, seen in 65 countries by half a billion people. It became the second best-selling music concert video of all time (after *Michael Jackson's Thriller*), selling more than 7 million copies worldwide.⁸

We address Applicant's arguments concerning the fame of the musician John Yanni Christopher in Section V, below, as Applicant offered them under the *DuPont* factor for consumer sophistication.

IV. The similarity or dissimilarity of the marks

We now turn to the *DuPont* factor focusing on the similarity or dissimilarity of the marks in their entirety as to appearance, sound, connotation and commercial

hearsay in ex parte appeals" but "may still consider the hearsay nature of evidence in assessing its probative value in an ex parte proceeding"); *In re Sela Prods. LLC*, 107 USPQ2d 1580, 1584 (TTAB 2013) ("[T]he Board does not, in ex parte appeals, strictly apply the Federal Rules of Evidence, as it does in inter partes proceedings."). Accordingly, we consider the Wikipedia.org evidence to the extent that this is what has been written about Yanni and read by Wikipedia.org users.

⁷ *Id.*

⁸ *Id.* at TSDR 17.

impression. *DuPont*, 177 USPQ at 567. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018) (quoting *In re Davia*, 110 USPQ2d 1810, 1812 (TTAB 2014)), *aff’d mem.*, 777 F. App’x 516 (Fed. Cir. 2019); *accord Krim-Ko Corp. v. Coca-Cola Bottling Co.*, 390 F.2d 728, 156 USPQ 523, 526 (CCPA 1968) (“It is sufficient if the similarity in either form, spelling or sound alone is likely to cause confusion.”) (citation omitted).

In comparing the marks, we are mindful that where, as here, the goods are in part identical, the degree of similarity necessary to find likelihood of confusion need not be as great as where there is a recognizable disparity between the goods. *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1721 (Fed. Cir. 2012); *Century 21 Real Estate Corp. v. Century Life of Am.*, 970 F.2d 874, 23 USPQ2d 1698, 1700 (Fed. Cir. 1992); *Jansen Enters. Inc. v. Rind*, 85 USPQ2d 1104, 1108 (TTAB 2007);

“The proper test is not a side-by-side comparison of the marks, but instead ‘whether the marks are sufficiently similar in terms of their commercial impression’ such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai*, 127 USPQ2d at 1801 (quoting *Coach Servs.*, 101 USPQ2d at 1721); *Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A.*, 685 F.3d 1046, 103 USPQ2d 1435, 1440 (Fed. Cir. 2012). We keep in mind that “[s]imilarity is not a binary factor but is a matter of degree.” *In re St. Helena Hosp.*, 774 F.3d 747,

113 USPQ2d 1082, 1085 (Fed. Cir. 2014) (quoting *Coors Brewing*, 68 USPQ2d at 1062).

The proper focus is on the recollection of the average customer, who retains a general rather than specific impression of the marks. *Geigy Chem. Corp. v. Atlas Chem. Indus., Inc.*, 438 F.2d 1005, 169 USPQ 39, 40 (CCPA 1971); *Inter IKEA Sys. B.V. v. Akea, LLC*, 110 USPQ2d 1734, 1740 (TTAB 2014); *L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1438 (TTAB 2012); *Winnebago Indus., Inc. v. Oliver & Winston, Inc.*, 207 USPQ 335, 344 (TTAB 1980). Because Applicant is seeking to register its mark for “business card holders in the nature of wallets; card wallets; clutch bags; crossbody bags; tote bags; wallets” and the cited registration is registered for “tote bags,” the average customer is an ordinary consumer.

As noted above, the mark in the cited registration is YANNI, in standard characters, and Applicant is seeking to register the mark YANI L’ADORE, in standard characters.

Because the similarity or dissimilarity of the marks is determined based on the marks in their entireties, “our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on a comparison of the entire marks, not just part of the marks.” *In re Ox Paperboard, LLC*, 2020 USPQ2d 10878, *4 (TTAB 2020) (citing *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161 (Fed. Cir. 2014)).

On the other hand, in articulating reasons for reaching a conclusion on the issue of confusion, there is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark,

provided the ultimate conclusion rests on a consideration of the marks in their entireties. Indeed, this type of analysis appears to be unavoidable.

In re Nat'l Data Corp., 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985).

With respect to Applicant's mark YANI L'ADORE, we find that term "Yani" is the dominant part of the mark because it is the lead element and, therefore, it has a position of prominence that is likely to be noticed and remembered by consumers.⁹ See *In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding "the identity of the marks' two initial words is particularly significant because consumers typically notice those words first"); *Palm Bay Imps. Inc. v. Veuve Clicquot Ponsardin Fondée En 1772*, 396 F.3d 1369, 73 USPQ2d 1689, 1692 (Fed. Cir. 2005) ("Veuve" is the most prominent part of the mark VEUVE CLICQUOT because "veuve" is the first word in the mark and the first word to appear on the label); *Century 21 Real Estate Corp. v. Century Life of Am.*, 23 USPQ2d at 1700 (upon encountering the marks, consumers will first notice the identical lead word). In this regard, it is likely that Applicant's use of YANI will call to mind Yanni, the well-known musician. Also, whereas L'ADORE means "love" and has a somewhat laudatory suggestion, YANI appears to be a coined term or simple variation of the name YANNI, on which consumers more likely will focus for source indication.

⁹ Applicant argues that because its mark does not refer to any individual and it does not have any special meaning, it is a coined term (i.e., YANI and the French word L'ADORE that means love). September 12, 2022 Response to an Office Action (TSDR 11). In other words, consumers will not necessarily perceive YANI L'ADORE or YANI LOVE as a name but as some other term.

YANI in Applicant's mark YANI L'ADORE and the registered mark YANNI are similar in appearance, sound, meaning and commercial impression. *See Alfacell v. Anticancer Inc.*, 71 USPQ2d 1301, 1305 (TTAB 2004) (ONCASE v. ONCONASE: "As seen and spoken, this middle portion may be missed by many of the relevant purchasers."); *Mag Instr. Inc. v. Brinkmann Corp.*, 96 USPQ2d 1701, 1714-15 (TTAB 2010) (difference of a single letter does not suffice to distinguish MAG STAR from MAXSTAR); *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985) ("Moreover, although there are certain differences between the [marks' CAYNA and CANA] appearance, namely, the inclusion of the letter 'Y' and the design feature in applicant's mark, there are also obvious similarities between them. Considering the similarities between the marks in sound and appearance, and taking into account the normal fallibility of human memory over a period of time (a factor that becomes important if a purchaser encounters one of these products and some weeks, months, or even years later comes across the other), we believe that the marks create substantially similar commercial impressions").

The single "N" in the YANI portion of YANI L'ADORE does not make a difference in sound, as consumers calling for the goods will pronounce YANI and YANNI identically. *See In re Omaha Nat'l Corp.*, 819 F.2d 1117, 2 USPQ2d 1859 (Fed. Cir. 1987) (affirming the Board's finding that FirstTier is the phonetic equivalent of "first tier") (cited in *Mini Melts, Inc. v. Reckitt Benckiser LLC*, 118 USPQ2d 1464, 1470 (TTAB 2016)); *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1961 (TTAB 2016); *RE/MAX of Am., Inc. v. Realty Mart, Inc.*, 207 USPQ 960, 964 (TTAB 1980)

(REMACS and RE/MAX indistinguishable in sound). Consumers likely will attribute the same meaning and commercial impression to YANNI and YANI and this common element renders the overall connotations and impressions of the marks similar.

Given the similarities between the marks and the identity of the goods, consumers familiar with the mark YANNI are likely to perceive Applicant's mark YANI L'ADORE as a variant mark denoting the special emotion of love.¹⁰ *See, e.g., Double Coin Holdings Ltd. v. Tru Dev.*, 2019 USPQ2d 377409, at *7 (TTAB 2019) ("Here, ROAD WARRIOR [for tires] looks, sounds, and conveys the impression of being a line extension of WARRIOR."); *Schieffelin & Co. v. Molson Cos., Ltd.*, 9 USPQ2d 2069, 2073 (TTAB 1989) ("Those consumers who do recognize the differences in the marks may believe that applicant's mark is a variation of opposer's mark that opposer has adopted for use on a different product."); *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271 (TTAB 2009) (VANTAGE TITAN "more likely to be considered another product from the previously anonymous source of TITAN medical diagnostic apparatus, namely, medical ultrasound devices").

While there is no explicit rule that likelihood of confusion automatically applies where a junior user's mark contains in part the whole of another mark, the fact that Applicant's mark YANI L'ADORE encompasses the essence of YANNI increases the similarity between the two. *See Lilly Pulitzer, Inc. v. Lilli Ann Corp.*, 376 F.2d 324,

¹⁰ The trailing L'ADORE portion is a point of departure, and we have considered it, but we find that it is not enough to differentiate the sound or commercial impression of the marks. Thus, we disagree with Applicant's contention that L'ADORE distinguishes the marks. Applicant's Brief, pp. 4-5 (4 TTABVUE 5-6).

153 USPQ 406, 407 (CCPA 1967) (THE LILLY as a mark for women’s dresses is likely to be confused with LILLI ANN for women’s apparel including dresses); *S. Gumpert Co., Inc. v. ITT Cont’l Baking Co.*, 191 USPQ 409 (TTAB 1976) (FLAV-O-BAKE for seasoned coating mix is likely to cause confusion with FLAVO for cake icing flavoring products); *see also China Healthways Inst. Inc. v. Wang*, 491 F.3d 1337, 83 USPQ2d 1123, 1125 (Fed. Cir. 2007) (applicant’s mark CHI PLUS is similar to opposer’s mark CHI both for electric massagers); *Double Coin Holdings*, 2019 USPQ2d 377409, at *6-7 (respondent’s mark ROAD WARRIOR is similar to petitioner’s mark WARRIOR).

“[I]f the dominant portion of both marks is the same, then confusion may be likely notwithstanding peripheral differences.” *In re Denisi*, 225 USPQ 624, 624 (TTAB 1985). The peripheral differences in this case fail to distinguish the marks. For these reasons, the similarity of the marks outweigh the differences. Thus, when comparing the marks overall, they are similar in sound, connotation and commercial impression. This *DuPont* factor weighs in favor of finding a likelihood of confusion.

V. The conditions under which and consumers to whom sales are made

Applicant contends that because Registrant John Yanni Christopher “is a famous pianist,” Registrant’s consumers are “likely his fans or those who have been to his performances or concerts.”¹¹

This specific group of consumers make confusion even less likely, because they want to purchase the tote bags, mugs, or t-shirts with Registrant’s name alone and nothing else. They also know where to purchase those specific goods. Registrant’s purchasers are sophisticated in the way that

¹¹ Applicant’s Brief, p. 5 (4 TTABVUE 6).

they are able to differentiate between tote bags of Registrant with other tote bags on the market.¹²

The Federal Circuit rejected a somewhat similar argument in *i.am.symbolic* about a mark's association with a celebrity, because "[i]n the absence of meaningful limitations ..., the Board properly presumed that the goods travel through all usual channels of trade and are offered to all normal potential purchasers." 123 USPQ2d at 1750. Because there is no restriction in the registration, we presume the tote bags travel in all channels of trade normal for those unrestricted goods and that they are available to all classes of consumers for those products, not just to fans of John Yanni Christopher's music. *In re Viterra*, 101 USPQ2d at 1908; *see also In re Bercut-Vandervoort & Co.*, 229 USPQ 763, 764 (TTAB 1986).

Nevertheless, assuming *arguendo* that Applicant's contention about Registrant's customers is true, it does not account for Applicant's customers who, while not Yanni fans, may have heard of Yanni and mistakenly believe that YANI L'ADORE tote bags are associated with or sponsored by Yanni.

In addition, the evidence submitted by Applicant that includes the price of tote bags routinely under ten dollars (i.e., offered for \$2.99, \$8.88, \$9.95, \$8.47, \$4.99, \$5.00, \$9.47, \$5.95, and \$6.00)¹³ reflects that they are so inexpensive that consumers are unlikely to exercise a high degree of purchasing care when making such a purchase. *See Recot Inc. v. M.C. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1899 (Fed. Cir. 2000) ("When products are relatively low-priced and subject to impulse buying,

¹² *Id.*

¹³ September 12, 2022 Response to Office Action (TSDR 41, 46, 49, 65, 67, 74, 79, 81).

the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”).

We find that the conditions under which sales are made weighs in favor of finding likelihood of confusion.

VI. No reported instances of actual confusion

Applicant contends that it “is unaware of any case of actual confusion by a consumer. Therefore, this factor favors a finding of no likelihood of confusion.”¹⁴

The absence of any reported instances of confusion is meaningful only if the record indicates appreciable and continuous use by Applicant of its mark for a significant period of time in the same markets as those served by Registrant under its mark. *Citigroup Inc. v. Cap. City Bank Grp., Inc.*, 94 USPQ2d 1645, 1660 (TTAB 2010), *aff’d*, 637 F.3d 1344, 98 USPQ2d 1253 (Fed. Cir. 2011); *New Era Cap Co., Inc. v. Pro Era, LLC*, 2020 USPQ2d 10596, at *17 (TTAB 2020); *Gillette Can. Inc. v. Ranir Corp.*, 23 USPQ2d 1768, 1774 (TTAB 1992). In other words, for the absence of actual confusion to be probative, there must have been a reasonable opportunity for confusion to occur. *New Era Cap Co.*, 2020 USPQ2d 10596, at *17; *Barbara’s Bakery Inc. v. Landesman*, 82 USPQ2d 1283, 1287 (TTAB 2007) (the probative value of the absence of actual confusion depends upon there being a significant opportunity for actual confusion to have occurred); *Red Carpet Corp. v. Johnstown Am. Enters. Inc.*, 7 USPQ2d 1404, 1406-1407 (TTAB 1988); *Central Soya Co., Inc. v. N. Am. Plant Breeders*, 212 USPQ 37, 48 (TTAB 1981) (“[T]he absence of actual confusion over a reasonable period of

¹⁴ Applicant’s Brief, p. 5 (4 TTABVUE 6).

time might well suggest that the likelihood of confusion is only a remote possibility with little probability of occurring.”).

In the appeal before us, Applicant filed an intent to use application and submitted no evidence that Applicant has used the mark, let alone the extent of its use. On this record, there is no evidence that there has been a reasonable opportunity for confusion to occur.

Also, as the Board explained in *In re Opus One Inc.*, 60 USPQ2d 1812, 1817 (TTAB 2001):

The fact that an applicant in an ex parte case is unaware of any instances of actual confusion is generally entitled to little probative weight in the likelihood of confusion analysis, inasmuch as the Board in such cases generally has no way to know whether the registrant likewise is unaware of any instances of actual confusion, nor is it usually possible to determine that there has been any significant opportunity for actual confusion to have occurred.

Therefore, the lack of any reported instances of confusion is a neutral *DuPont* factor.

VII. Conclusion

Because the marks are similar, the goods are in part identical, and we presume that they are offered in the same channels of trade to the same classes of consumers, we find that Applicant’s mark YANI L’ADORE for “business card holders in the nature of wallets; card wallets; clutch bags; crossbody bags; tote bags; wallets” is likely to cause confusion with the registered mark YANNI for “tote bags.”

Decision: We affirm the refusal to register Applicant’s YANI L’ADORE.